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IN THE

Supreme Court of the United States

No. 216., October Term, 1952.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

CHICAGO PACKAGED FUEL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX.

	PAGE
Opinions below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
Specification of Errors to be Urged	4
Reasons for Granting the Writ	5
Conclusion	14

TABLE OF CASES.

Buckeye Cotton Oil Co. v. Louisville & N. R. Co., 6th Cir., 24 F. 2d 347	9
Cacey v. Virginian Ry. Co., 4th Cir., 85 F. 2d 976	12
City of Cleveland v. Baltimore & O. R. Co., 6th. Cir., 71 F. 2d 89	9, 12
Deep Vein Coal Co. v. Chicago & E. I. Ry. Co., 7th Cir., 71 F. 2d 963	12
Erie R. Co. v. Tompkins, 304 U.S. 64	11
John P. Gorman Coal Co. v. Louisville & N. R. Co., 213 Ky. 551, 281 S.W. 487	9
J. V. McNicholas Transfer Co. v. Pennsylvania R. Co., 6th Cir., 154 F. 2d 265	9

N 2 1954

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Kokusai Kisen Kabushiki Kaisha v. Columbia S. Co., 23 F. Supp. 403 (S.D. N.Y.) (Affirmed 100 F. 2d 1016) 9

Louisville & N. R. Co. v. Atlantic Co., 66 Ga. App. 791, 19 S.E. 2d 364 9

National Transit Co. v. Davis, 3rd Cir., 6 F. 2d 729 12

Northern Pac. Ry. Co. v. Thornton Bros. Co., 206 Minn. 193, 288 N.W. 226 9

Russell v. Shell Oil Co., 339 Ill. App. 168, 89 N.E. 2d 415 ..... 4, 5, 6, 10

Smoke v. Turner Const. Co., 54 F. Supp. 369 (D. Del.) 9

Southern Pac. Co. v. Fellows, 22 Cal. App. 2d 87, 71 P. 2d 75 9

Terminal R. Ass'n. of St. Louis v. Ralston-Purina Co., 352 Mo. 1013, 180 S.W. 2d 693 12

Watkins v. Baltimore & O. R. Co., 29 F. Supp. 700 (W.D. Pa.) 12

Westinghouse Co. v. Building Corp., 395 Ill. 429, 70 N.E. 2d 604 10

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vs.

CHICAGO PACKAGED FUEL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Chicago and North Western Railway Company, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered March 24, 1952, on which petition for rehearing was denied April 23, 1952.

OPINIONS BELOW.

The opinion and dissenting opinion of the Court of Appeals are reported in 195 F. 2d 467. The opinion of the trial court is reported in 99 F. Supp. 361. A previous opinion of the Court of Appeals in the same case is reported in 183 F. 2d 630.

JURISDICTION.

Petition for rehearing of the judgment of the Court of Appeals was denied on April 23, 1952. The judgment was entered March 24, 1952. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED.

1. Whether a contract used throughout the railroad industry and which indemnifies the railroad for all losses arising, wholly or in part, in connection with the existence, operation or use of a coal hopper, can be held not to apply to a situation where a railroad suffered losses arising at least in part in connection with the existence, operation and use of a coal hopper on the railroad tracks pursuant to the contract.

2. Whether the Court of Appeals may disregard the holdings of the courts of the State of Illinois that in a suit on an indemnity contract (protecting against all losses arising in connection with operations), negligence and proximate cause are not issues.

3. Whether the Court of Appeals may reverse findings and conclusions of the trial court even though such findings and conclusions are not found to be "clearly erroneous."

STATEMENT OF THE CASE.

The Chicago Packaged Fuel Company sought permission from the Chicago and North Western Railway Company to construct and operate a coal hopper on an industrial lead track of the railroad in Chicago, Illinois. On October 22, 1947, a standard license contract was entered into whereby the Fuel Company was given permission to

construct, maintain, repair, renew, reconstruct, operate and use the coal hopper (R. 8-13). This contract contained the following provision for indemnity:

> "The licensee assumes and agrees to pay for all loss or damage to property and injury to or death of persons, including costs and expenses incident thereto, arising, wholly or in part, from or in connection with the existence, construction, maintenance, repair, renewal, reconstruction, operation, use or removal of said facility or any defects therein or failure thereof, causing same or contributing thereto; and the Licensee shall forever indemnify the Railway Company against and save harmless from all liability for any such loss, damage, injury and death, including all costs and expenses incident thereto."

The coal hopper was subsequently constructed on the railroad track pursuant to the license agreement. On February 16, 1948, Frank Drews drove a truck to the Fuel Company to deliver a load of coal (R. 41). He asked the Fuel Company officials whether everything was clear on the track (R. 56, 54). Upon being assured that it was, he then backed his truck to the coal hopper so that the wheels were only about six to eight inches from the track (R. 43). The Fuel Company then started the coal hopper machinery (R. 42). Drews then placed himself at the left rear corner of the truck and began regulating the lever at the rear of the truck in order to let the coal drop into the coal hopper (R. 44-45). While the coal hopper was thus in operation and being used, an engine came around the sharp curve and struck the truck, seriously injuring Drews (R. 47, 59).

Drews filed suit against the railroad for $150,000 and this suit was settled for $55,000 after repeated requests by the railroad to the Fuel Company to indemnify and

save it harmless from all liability in connection with the accident pursuant to the license agreement (R. 15-21). The Fuel Company did not deny that this settlement was fair and reasonable under the circumstances.

The Railway Company then brought suit against the Fuel Company for $55,000 under the indemnity provisions of the license agreement. The trial court granted the defendant's motion to dismiss the complaint, but the Court of Appeals reversed (183 F. 2d 630). The trial court then heard the evidence and rendered judgment for the plaintiff railway company (99 F. Supp. 361). The trial court found, among other things:

> "That the injury arose at least in part in connection with the use of the hopper can hardly be seriously controverted. At the time of the accident, the hopper machinery was running, Drews was in the process of dumping coal into it, and had been so doing some 20 or 25 minutes. It is obvious that this was the prime purpose for which the hopper was constructed in the first instance. The very existence of the coal hopper between the tracks rendered it necessary for Drews to place himself and his truck in a hazardous position in order to avail himself of its use. Patently, it was exactly this type of occurrence that the indemnity agreement was designed to meet, and defendant cannot now escape the consequences of it." (99 F. Supp. 361, 364)

The Fuel Company appealed, and the Court of Appeals reversed the trial court's judgment in a 2 to 1 decision (195 F. 2d 467).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that the rule announced in *Russell* v. *Shell Oil Co.*, 339 Ill. App. 168, 89 N.E. 2d 415 (1949) is not applicable to the case at bar.

2. In holding that exemption from negligence must be specifically expressed in indemnity contracts under Illinois law, contrary to the holding in *Russell* v. *Shell Oil Co., supra.*

3. In deciding the case without the support of any Illinois authority.

4. In holding, contrary to the undisputed evidence and the findings of the trial court, that the accident did not arise in connection with the use or existence of the coal hopper, that the use of the hopper situated on the tracks did not increase the hazards of railroading, that the existence of the hopper between the tracks did not make it necessary for Drews to place himself and the truck in a dangerous position, and that the indemnity agreement was not applicable and was not designed to cover this type of occurrence.

5. In reversing the District Court.

REASONS FOR GRANTING THE WRIT.

1. The majority opinion of the Court of Appeals is directly contrary to the law of Illinois on the question as enunciated by the Illinois courts, and nullifies many similar contracts entered into by various railroads. This question is of vital interest to the entire railroad industry. Applications by industries to railroads for the licensing of the construction and use of some facility such as a coal hopper on or close to the railroad tracks is a daily occurrence. It is obvious that the use of coal hoppers and other such facilities on or adjacent to railroad tracks materially increases the hazards of railroading. Nearness of such facilities to the path of engines means that there is an increased likelihood of personal injuries.

As in the case at bar, a coal hopper is used by trucks for the dumping of coal. The presence of trucks and truck drivers on or close to the tracks naturally creates greater possibilities for accidents.

No railroad could possibly afford to permit the construction of such facilities on or close to the tracks unless it secured full indemnification for all losses arising wholly or in part in connection with the use of such facilities. What the majority opinion of the Court of Appeals does in the instant case is to deny not only that there is any hazard involved in the use of such facilities but also that the standard wording of these contracts is not applicable to a situation where a person using the facility is struck by a railroad engine. If the broad wording of the indemnity provision in the contract in the case at bar is not applicable, then certainly the drafting of any provision which would be held applicable is seemingly impossible. The railroad industry consequently is left with confusing, conflicting judicial guideposts, and the only remedy is review by the Supreme Court of the United States.

2. Under Rule 38 (5b), this Court may grant review where a Court of Appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions." It is respectfully submitted that the majority opinion in the instant case is clearly in conflict with the decisions of the Illinois courts. The most recent case in Illinois on the issue involved herein is *Russell* v. *Shell Oil Co.*, 339 Ill. App. 168, 89 N.E. 2d 415 (1949). In that case, Russell, a painting contractor, made a settlement with one of his employees for personal injuries sustained while painting some floodlight poles located at a Shell gasoline station. A pole fell over as he

was painting it, allegedly due solely to Shell's negligence. Russell's insurance carrier sued Shell, but Shell pleaded that an indemnity agreement between Russell and Shell covered the situation. The court held that the agreement was a complete defense and dismissed the complaint. The language of the indemnity agreement in the *Russell* case is strikingly similar to that in the case at bar, as may be seen by placing the applicable provisions of one agreement beside the other:

Russell Case.	**Case at Bar.**
"Contractor shall hold Shell harmless from any and all claims for injury (including death), to persons (including Contractor's agents and employees), or damage to property (including Contractor's property), *resulting from or arising in connection with any of Contractor's operations,* shall defend any such claim asserted or suit brought against Shell resulting in any such suit; provided, however, that Shell shall have the right, at its option, to participate in any such litigation, without, however, relieving Contractor of its obligations hereunder." (Emphasis added.)	"The Licensee assumes and agrees to pay for all loss or damage to property and injury to or death of persons, including costs and expenses incident thereto, *arising, wholly or in part, from or in connection with the existence, construction, maintenance, repair, renewal, reconstruction, operation, use or removal of said facility* or any defect therein or failure thereof, causing same or contributing thereto; and the Licensee shall forever indemnify the Railway Company against and save it harmless from all liability for any such loss, damage, injury and death, including all costs and expenses incident thereto." (Emphasis added.) (R. 9)

Although Shell was allegedly guilty of negligence in allowing the pole to be in an unsafe condition, and although Shell's negligence was the sole negligence

charged, the court held that injury did in fact "arise in connection with the contractor's operations," and that Shell was therefore indemnified under the terms of the contract. The Illinois court said, in language that is particularly pertinent to the case at bar:

> "It seems clear that the injury to Campbell arose in connection with the 'contractor's operations.' As defendant argues, the contract includes all accidents 'resulting from or arising in connection with any of contractor's operations'; that 'the indemnifying agreement is expressed in clear and explicit language and the intention of the parties is indicated in unequivocal terms.' There is also force in the contention of defendant 'that negligence of either party does not enter into the case, because the injury to the employee (Campbell) resulted from or arose in connection with one of the contractor's operations against which he agreed to hold defendant harmless.' We agree with the opinion of the trial court that the indemnity agreement constituted a complete defense to plaintiff's cause of action." (89 N.E. 2d 415, 417)

The *Russell* case and the case at bar are analogous because:

A. The wording of the indemnity agreements is practically the same. Both use the phrase "arising in connection with the operations." The indemnity is even broader in the case at bar because of the addition of the words "wholly or in part," which words are completely overlooked in the decision of the Court of Appeals herein.

B. In neither agreement did the provision expressly state that the indemnitee was covered where it was negligent. Indeed, the *Russell* case specifically holds that such language is not necessary in Illinois. Use of the words

"arising in connection with the operations"[1] and "wholly or in part"[2] alone indicates that proximate cause and negligence are not issues under such contracts. Thus the majority opinion of the Court of Appeals entirely disregarded the significance of the *Russell* case when it said: "It is plain that exemption from liability for negligence is not expressed in the contract here involved, * * *" (195 F. 2d 467, 472) (R. 107).

C. In each case the indemnitor claimed that the indemnitee was negligent and that such negligence was the proximate cause of the injuries. No other negligence was even charged in the *Russell* case, but the Illinois court held that negligence was not an issue under the wording of the agreement.

The Court of Appeals attempts to distinguish the *Russell* case by saying: "Here our contract is not a contract for work to be performed for plaintiff, and the injuries sustained are in no way connected with the contract. They arose solely out of the negligence of plaintiff." (195 F.

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1 There are many cases in accord with the Russell opinion insofar as they give a liberal meaning to the words "in connection with" in indemnity agreements. Some of the courts even designate these words "the magic words of the agreement." These cases demonstrate that the proximate cause or the negligence of the indemnitee is not an issue under such wording. See City of Cleveland v. Baltimore & O. R. Co., 6th Cir., 71 F. 2d. 89; Northern Pac. Ry. Co. v. Thornton Bros. Co., 206 Minn. 193, 288 N.W. 226; J. V. McNicholas Transfer Co. v. Pennsylvania R. Co., 6th Cir., 154 F. 2d 265; Smoke v. Turner Const. Co., 54 F. Supp. 369 (D. Del.); Kokusai Kisen Kabushiki Kaisha v. Columbia S. Co., 23 F. Supp. 403 (S.D. N.Y.) (Affirmed 100 F. 2d 1016); Louisville & N. R. Co. v. Atlantic Co., 66 Ga. App. 791, 19 S.E. 2d 364.

2 Words such as "wholly or in part" or "directly or indirectly" used in indemnity agreements have consistently been held to indicate the intention of the parties to give the indemnitee broad protection. As in the cases cited in the previous footnote, in each of these cases the alleged negligence of the indemnitee was not an issue under the wording of the contract. See Southern Pac. Co. v. Fellows, 22 Cal. App. 2d 87, 71 P. 2d 75; John P. Gorman Coal Co. v. Louisville & N. R. Co., 213 Ky. 551, 281 S.W. 487; Buckeye Cotton Oil Co. v. Louisville & N. R. Co., 6th Cir., 24 F. 2d 347. The court below attempted to distinguish some of these cases on the basis of insignificant differences and assumed facts not supported by the record or the findings of the trial court.

2d, 467, 471) (R. 105). The answers to this attempt to distinguish the *Russell* case are clear:

a. It makes no difference whether the plaintiff or the defendant is to perform the work contemplated by the contract. There is nothing in the *Russell* opinion which indicates that this factor is at all significant.

b. The evidence and the findings of the trial court clearly show that the injuries were connected with the contract. The license agreement specifically contemplated and provided that the coal hopper was to be used and operated. Pursuant to the contract, the hopper was being used and operated at the time of the accident, and the injuries arose at least in part in connection with such use and operation (R. 42-45).

c. The statement that the injuries arose out of plaintiff's negligence completely overlooks the specific holding of the *Russell* case. We respectfully submit that the defendant has misled the majority of the Court of Appeals herein into a determination of the proximate cause issue in the case of *Frank Drews* (the injured man) v. *Chicago and North Western Railway Co.*, rather the determination of the breach of contract issue raised by the instant case. The Illinois court avoided such a pitfall in the *Russell* case and explicitly held that the negligence of either party was not an issue under the contract.

It is therefore respectfully submitted that the decision below is directly contrary to that of the Illinois court in the leading case of *Russell* v. *Shell Oil Co.*, 339 Ill. App. 168, 89 N.E. 2d 415. The only other Illinois case even cited by the court below was *Westinghouse Electric Elevator Co.* v. *LaSalle Monroe Bldg. Corp.*, 395 Ill. 429, 70 N.E. 2d 604, but that case was specifically distinguished

not only in the *Russell* case, but also by the court below in the first appeal of the instant case (183 F. 2d 630, 632). The *Westinghouse* case simply held that the court could not add words to an indemnity contract which were not there, and since the contract specifically afforded indemnification only for losses arising out of acts of the Contractor's employees, recovery could not be had for losses arising out of the acts of employees of another party. Thus, although the Court of Appeals pays lip service to the rule in *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, it is significant that there are no Illinois cases supporting its judgment herein.

3. It is also submitted that the decision below constitutes such an unwarranted substitution of the judgment of the Court of Appeals for the trial court as to require review by this Court. As a basis for its decision, the majority opinion of the Court of Appeals made several findings of fact which are in no way supported by the evidence and which are diametrically opposed to the findings of the trial court which heard the evidence. However, the Court of Appeals did not state that the findings of the trial court were clearly erroneous or indicate in any way why they might be so considered. The findings of the court below are as follows:

a. The Court of Appeals stated that "Drews' injuries were in no manner whatsoever connected with the operation of the hopper." The record shows, however, that the Fuel Company turned on the coal hopper machinery and that Drews was dumping coal into the coal hopper on the tracks when he was hit by the engine (R. 42-45). The trial court found: "That the injury arose at least in part in connection with the use of the hopper can hardly be seriously controverted." (99 F. Supp. 361, 364) (R.

76). It is respectfully submitted that the court below was unwarranted in finding to the contrary.

b. The Court of Appeals made no attempt to consider the significance of the word "existence" in the indemnity agreement and found that the existence of the coal hopper did not at least in part contribute to the accident. The evidence, however, showed that it was necessary to back the coal truck to within a few inches of the track in order to dump coal from the truck into the hopper, and that it was necessary for Drews to stand at the rear of the truck in order to regulate the lever which gauged the flow of the coal into the coal hopper (R. 42-45). The trial court found that: "The very existence of the coal hopper between the tracks rendered it necessary for Drews to place himself and his truck in a hazardous position in order to avail himself of its use." (99 F. Supp. 361, 364) The Court of Appeals thus not only does violence to the language of the contract and ignores the findings of the trial court, but it completely disregards the well-established principle that the railroad is fully indemnified where the language of the agreement indicates that the mere existence or location of a facility was recognized as being hazardous. *Cacey* v. *Virginian Ry. Co.*, 4th Cir., 85 F. 2d. 976; *Watkins* v. *Baltimore & O. R. Co.*, 29 F. Supp. 700 (W. D. Pa.); *National Transit Co.* v. *Davis*, 3rd Cir., 6 F. 2d 729; *Deep Vein Coal Co.* v. *Chicago & E. I. Ry. Co.*, 7th Cir., 71 F. 2d 963; *Terminal R. Ass'n of St. Louis* v. *Ralston-Purina Co.*, 352 Mo. 1013, 180 S.W. 2d 693; *City of Cleveland* v. *Baltimore & O. R. Co.*, 6th Cir., 71 F. 2d 89.

c. We have already discussed the hazard of the use of any facility on or adjacent to a railroad track. However, the Court of Appeals found that the existence and

use of the facility on the tracks was not hazardous. Certainly this court will take judicial notice of the fact that industry normally is not conducted directly on railroad tracks. Certainly the addition of any such facility on a railroad track materially increases the hazards of railroading, as the trial court found. This is especially true where an industrial lead track is involved. As one witness explained, the "lead track is a sort of a main track and has auxiliary tracks coming off of it to serve different industries in the vicinity" (R. 57-58). And this is especially true where the facility is located on a sharp curve. As the witness said concerning Exhibit 7: "It was taken to show the limited view of the engine crew as they approached" (R. 59). As the exhibit shows, the track curves sharply around the Fuel Company plant and the hopper is located at the point of this curve so that it is partially concealed to an engine approaching from the west. But even if the hopper had been located on a straight and little used track, it would clearly have increased the normal hazards of railroading. It is apparent that the indemnification agreement was entered into by the parties because of these increased hazards.

4. The Court of Appeals also found that the accident was solely caused by the negligence of the railroad. Aside from the fact that negligence and proximate cause are not an issue under the indemnity contract pursuant to the ruling of the Illinois courts, as previously discussed, the record does not support such a finding. Certainly the Fuel Company should not have given Drews permission to dump the coal in the coal hopper and told him that "Everything was clear" after he had inquired of them about the engine, when in fact the engine was still in the vicinity (R. 54, 56). In addition, the Fuel Company should

have furnished protection while Drews was accomplishing the hazardous job of delivering coal to them on an industrial lead track on a sharp curve. The trial court heard no evidence as to proximate cause or negligence because this was not an issue under the contract. There is therefore no basis in the record for the decision of the Court of Appeals as to such issue.

Conclusion.

For the foregoing reasons, it is urged that this petition for a writ of certiorari be granted to permit a full consideration of the important matters involved, to the end that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	4
Statement of the Case	4
Argument	7
Conclusion	15

Table of Cases.

Chicago & N. W. R. Co. v. Chicago Packaged Fuel Co., 99 F. Supp. 361	1
Chicago & N. W. Ry. Co. v. Chicago Packaged Fuel Co., 195 F. 2d 467	1, 3
Chicago & N. W. R. Co. v. Chicago Packaged Fuel Co., 183 F. 2d 630	2
Marshall v. Maryland, Delaware and Virginia Railroad Co., 31 Del. 170	10
Martin v. American Optical Co., 184 F. 2d 528	10
Mostyn v. Delaware L. and W. R. Co., 160 F. 2d 15	10
North American Ry. Co. v. Cincinnati Traction Co., 172 F. 214	10
Perry v. Payne, 217 Pa. 252, 66 A. 553	10
Russell v. Shell Oil Co., 339 Ill. App. 168, 89 N. E. 2d 415	8, 11
Sinclair Prairie Oil Co. v. Thornley, 127 F. 2d 128	10

Southern Bell Tel. and Tel. Co. v. Mayor and Board of Aldermen, 74 F. 2d 983..... 10
Southern Pacific Co. v. Layman, 173 Ore. 275, 145 P. 2d 295.....10, 12
Thompson-Starrett Co. v. Otis Elevator Co., 271 N. Y. 36, 2 N. E. 2d 35..... 10
United States v. Wallace, 18 F. 2d 20..... 10
Westinghouse Electric Elevator Co. v. LaSalle Monroe Building Corp., 395 Ill. 429, 70 N. E. 2d 415.... 9
175 A. L. R. 29, 30..... 9

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the District Court (R. 72-77) is reported at 99 F. Supp. 361. The opinion of the United States Court of Appeals, for the Seventh Circuit, reversing the judgment of the District Court (R. 100-107) is reported at 195 F. 2d 467.

Theretofore the District Court had entered a judgment sustaining the respondent's motion to dismiss (R. 25-27),

not reported, which judgment was reversed by the United States Court of Appeals, for the Seventh Circuit, and the cause remanded for a hearing on the merits for the reason, as it stated, that it did not appear to a certainty from the petitioner's complaint that the petitioner would not be entitled to relief under any state of facts which it might be able to prove on such hearing. The opinion of the Court of Appeals in that regard is reported at 183 F. 2d 630.

JURISDICTION.

The jurisdictional requisites are set forth in the petition.

QUESTIONS PRESENTED.

It is respectfully submitted that the petitioner's statement of the questions presented do not warrant a review of the judgment of the Court of Appeals by this Court on *certiorari*. Furthermore the questions, as stated by the petitioner, contain assertions which are foreign to the record, or contrary to it, or must necessarily be resolved as questions of fact.

1. In the first of these purported questions it is asserted that the contract in question is "used throughout the railroad industry." It is neither alleged in the petitioner's complaint nor is there any proof in the record that such is the fact. The contract shows on its face (See plaintiff's Exhibit 1) that it is merely a printed form prepared by the petitioner. It does not appear from the record that any other railway used this form.

It is also assumed in this same purported question that the petitioner suffered loss "arising at least in part in connection with the existence, operation and use of 'the coal hopper'." Whether it did or not is purely a question of fact to be determined from the evidence, the burden of proving which was on the plaintiff. The Court of Appeals specifically found that such was not the fact, that there was no evidence to support this contention, and that the petitioner's loss arose solely from its own negligence or misconduct.

2. In the second of these purported questions it is assumed that the Court of Appeals disregarded "the holdings of the courts of the State of Illinois." This assumption is directly contrary to the record. The Court of Appeals (R. 103, 195 F. 2d at 470) specifically held:

> "In the instant case the contract was made and was to be performed in Illinois, and must be interpreted by Illinois law. The cases cited above are in accord with the Illinois law, as stated in *Westinghouse Electric Elevator Co.* v. *La Salle Monroe Bldg. Corp.*, 395 Ill. 429, 433, in which the court held that an indemnity contract will not be construed as indemnifying one against his own negligence, unless such construction is required by clear and explicit language in the contract."

It is not the law of Illinois, as petitioner asserts, that in a suit on an indemnity contract "negligence and proximate cause are not issues." They are always issues unless excluded by the terms of the indemnity agreement itself or the factual situation is such as to eliminate them.

3. In the third of these purported questions it is assumed that the Court of Appeals did not find the findings and conclusions of the trial court to be "clearly erroneous." This assertion is contrary to the record. The Court of Appeals, as appears from its opinion (R. 100-107, 195 F. 2d

467), not only found that the findings and conclusions of the trial court were clearly erroneous, but that the petitioner's loss was solely the result of its own negligence or misconduct.

STATUTES INVOLVED.

No federal or state statute is involved. The petitioner's case involves merely the construction of a simple contract with respect to the factual situation disclosed by the evidence.

STATEMENT OF THE CASE.

The evidence discloses that in October 1947, the petitioner and the respondent entered into a written agreement by which the petitioner "licensed" the respondent to construct, maintain and use a coal hopper under, not "on" as asserted by petitioner, a spur track leading from the petitioner's Rose Hill station in Chicago, Illinois, across the respondent's premises. A plat showing the location of this track and the position of the hopper on the respondent's premises appears on page 11 of the printed transcript of the record.

It was provided by the agreement that the hopper was to be constructed in accordance with the specifications shown by blueprints attached to and made a part thereof, and under the direction and supervision of the chief engineer of the railway company and to his satisfaction. (R. 8.)

It does not appear from either the pleadings or the evidence that this agreement was a "standard" license

contract as asserted by the petitioner, whatever that may be. It merely appears (Plaintiff's Exhibit 1), that use was made of a printed form prepared by the petitioner, the Chicago and North Western Railway Company.

The agreement contains the following clause:

> "Fourth. The licensee assumes and agrees to pay for all loss or damage to property and injury to or death of persons, including costs and expenses incident thereto, arising, wholly or in part, from or in connection with the existence, construction, maintenance, repair, renewal, reconstruction, operation, use or removal of said facility or any defect therein or failure thereof, causing same or contributing thereto; and the licensee shall forever indemnify the railway company against and save it harmless from all liability for any such loss, damage, injury and death, including all costs and expenses incident thereto." (R. 9.)

According to the allegations of the petitioner's complaint, the coal hopper was subsequently constructed in accordance with the terms and provisions of this agreement and was in existence and use continuously thereafter to and including February 16, 1948. (R. 4.)

On February 16, 1948, one Frank Drews, a truck driver for Zipf Brothers Coal Company, delivered to the respondent's place of business a truck load of screening coal. Drews reported to the respondent's office, inquired if everything was clear, was advised that it was, and the machinery in the coal hopper was started. Drews thereupon backed his truck up to the hopper, stopping the rear wheels 6 or 8 inches outside the nearest rail of the tracks. (R. 42.) The front end of the truck bed was raised and Drews proceeded to the left rear of the truck where he opened one of the end chutes by means of a lever attached thereto, allowing the coal to run from the truck into the hopper. (R. 44.)

While doing so he stood a foot or so outside the rails, facing the truck. (R. 53.)

After the truck had been standing in this position for at least 20 or maybe 25 minutes (R. 50), a switch engine operated by the petitioner approached from the west, collided with the truck and pushed it on to Drews, pinning him under the dual wheels (R. 48) as a result of which he was seriously injured. Drews testified that he heard no bell or whistle. (R. 50.) He did, however, hear some steam escaping, saw the engine which, at the time, was very close to him (R. 50), and attempted to run but was unable to get away. (R. 47.)

The evidence shows that the truck was painted red except for the lettering. The bed was probably 10 feet long and 5 feet high and before the front end was raised was at least 3½ feet above the ground. (R. 51.) When the front end was raised, as it was at the time of the occurrence, the top of the bed was 12 feet above the ground. The lettering on the truck was in gold with a blue background. It was conspicuous. (R. 52.)

There is no charge laid in the petitioner's complaint, nor is there any evidence in the record tending to prove, that the respondent was guilty of any negligence which contributed to cause the injuries sustained by Drews. Nor is there any charge in the complaint that there was any defect in the coal hopper or failure thereof or that it was not properly functioning. Nor is there any evidence tending to prove that such was the fact, or that Drews was injured by or because of the hopper, or that the respondent did or omitted to do anything with respect to the coal hopper that was a proximate cause of his injuries.

On April 14, 1948, Drews brought an action against the petitioner to recover damages for the injuries sustained, charging in his complaint that they were proximately caused

by negligence and wilful and wanton misconduct on the part of the petitioner. (See plaintiff's Exhibit 6.) The petitioner settled his claim for $55,000.00. It has not denied that it was liable to Drews or that its misconduct was the sole cause of his injuries. No excuse was offered for its misconduct. Neither the engineer nor the fireman in charge of the engine were called as witnesses on the hearing. Nor was it shown that they were not available.

ARGUMENT.

The real question presented by the petitioner's contentions, if it can be said there is any, is: whether by the agreement under consideration the respondent undertook to indemnify the petitioner for loss sustained solely through its own misconduct merely because such misconduct on its part took place *at or near* the location of the hopper.

It is obvious that the contract under consideration (R. 8-10) is neither a liability policy nor a contract of general indemnity. It is merely a simple agreement on a printed form prepared by the petitioner (See plaintiff's Exhibit 1), purporting to license the respondent to construct and maintain a coal hopper under a spur track on the respondent's premises. Attached to this agreement are detailed specifications with respect to the location, construction, installation, elevations, materials to be used, etc., for the proposed hopper. It is provided that the work of construction and maintenance should be done and completed in a good and workman-like manner, at the sole expense of the respondent, and under the direction and supervision of the chief engineer of the petitioner and to his

satisfaction. It is also provided that if in the judgment of the petitioner it was necessary to provide support for its tracks during the work of construction, the petitioner might provide such supports at the respondent's cost.

The installation of the hopper necessitated excavating under the tracks, the bracing and supporting of the rails, the presence of workmen, tools and materials at or near the tracks. It also necessitated, after its construction, proper maintenance and use of the hopper. This involved risks to which the petitioner would be exposed because of such construction, maintenance and use, liability for which it was proper that the respondent should assume, and which it agreed to do by the fourth paragraph of the contract quoted above. It was, therefore, only the liability of the petitioner resulting from a breach of the provisions of the agreement, with respect to the construction, maintenance and use of the hopper, against which the respondent undertook to indemnify it.

There is not a single phrase or sentence in the agreement, or in the indemnifying clause thereof, by which the respondent undertook or assumed to indemnify the petitioner against a loss caused solely by petitioner's own misconduct, or from which it can be inferred that any such an indemnity was contemplated by either of the parties at the time the agreement was entered into. The agreement provides no such indemnity.

What the petitioner is contending for here is that the Court should read into this agreement an indemnity which is not there and was never contemplated by the parties, and is attempting to support this contention by a misinterpretation of the opinion of the court in the case of *Russell* v. *Shell Oil Co.*, 339 Ill. App. 168, 89 N. E. 2d 415, decided by one of the Appellate Courts of Illinois. It is asserted and assumed that in this case the Appellate Court has laid down a new and different rule with respect to

the construction of indemnifying clauses in contracts such as the one under consideration—that in a suit on such a contract, the purpose and other provisions of the agreement are to be disregarded, and that negligence and proximate cause are not issues. The opinion in that case, however, admits of no such interpretation.

The rule applied in construing such indemnity clauses and the reasons therefor are clearly stated by the Supreme Court of Illinois in the case of *Westinghouse Electric Elevator Co.* v. *LaSalle Monroe Building Corp.*, 395 Ill. 429, 70 N. E. 2d 415. In that case the Supreme Court said at page 433:

> "It is quite generally held that an indemnity contract will not be construed as indemnifying one against his own negligence, unless such a construction is required by clear and explicit language of the contract (*Sinclair Oil Co.* v. *Thornley*, 127 F. 2d 128; *Doughnut Machine Corp.* v. *Bibbey*, 65 F. 2d 634), or such intention is expressed in unequivocal terms. *Thompson-Starrett Co.* v. *Otis Elevator Co.*, 271 N. Y. 36, 2 N. E. 2d 35; *Employers' Liability Assur. Corp. Ltd. of London, Eng.* v. *New York Linen Supply and Laundry Co.*; 239 N. Y. 560, 147 N. E. 195; *Manhattan Railway Co.* 661. *Cornell*, 54 Hun. 292, 7 N. Y. S. 557, affirmed in 130 N. Y. 637, 29 N. E. 151."

There is nothing unique about the Illinois rule of construction and it is followed in practically every jurisdiction. In an annotation in 175 A. L. R. at page 29 on this rule, the author of the annotation states at page 30:

> "In the overwhelming majority of the cases the result reached by their interpretational efforts can be condensed into the simple rule that where the parties fail to refer expressly to negligence in their contract such failure evidences the parties' intention not to provide for indemnity for the indemnitee's negligent acts. While this rule of construction is expressed by the courts in various forms, all of them in effect say:

'A contract of indemnity will not be construed to indemnify a person against his own negligence where such intention is not expressed in "clear and unequivocal terms". ' "

In note 11 on page 30 to this statement, the author points out that there are literally hundreds of cases supporting this proposition and cites a long list of cases from various jurisdictions to illustrate its universal application.

See also *Southern Pacific Co.* v. *Layman,* 173 Oregon 275, 145 P. 2d 295, *North American Ry. Co.* v. *Cincinnati Traction Co.,* 172 F. 214, *Martin* v. *American Optical Co.,* 184 F. 2d 528 at 529, *Mostyn* v. *Delaware L. and W. R. Co.,* 160 F. 2d 15 at 18-19, *Perry* v. *Payne,* 217 Pa. 252, 66 A. 553, *Thompson-Starrett Co.* v. *Otis Elevator Co.,* 271 N. Y. 36, 2 N. E. 2d 35, *Marshall* v. *Maryland, Delaware & Virginia Railroad Co.,* 31 Del. 170, *Southern Bell Tel. and Tel. Co.* v. *Mayor and Board of Aldermen,* 74 F. 2d 983 at 984-985, *United States* v. *Wallace,* 18 F. 2d 20 at 21, and *Sinclair Prairie Oil Co.* v. *Thornley,* 127 F. 2d 128 at 133, in which the rule was specifically applied.

Furthermore the rule is recognized in practically all of the cases relied upon by the petitioner. The cases relied upon by the petitioner, however, differ widely both on the terms of the agreements and on the facts from those under consideration here. In a few of them, the indemnitor specifically and clearly agreed to indemnify the indemnitee without regard to the indemnitee's misconduct. In another few, the facts developed by the evidence disclosed that the liability was clearly such as the indemnitor had agreed to indemnify. A number of them involve side track agreements in which the indemnitor agreed not to place any pole, building, or other obstruction within a given distance of the rails, but violated its agreement as a result of which injury was sustained. Others involve construction contracts in which the contractor agreed to indemnify against liability arising out of the work being performed.

None of these situations obtain in the case at bar. In the case at bar the respondent agreed to construct and install the hopper in accordance with plans and specifications prescribed by the petitioner under its direction and to its satisfaction. According to the allegations of the petitioner's complaint the hopper had been so constructed, and had been continuously in existence and use for some period of time prior to the day Drews was injured. The evidence discloses that such was the fact. The contract had been performed. It is not alleged and there is no evidence of any defect in the hopper, or that it was not properly maintained, or that it was improperly used, or that it had any connection, causal or otherwise, with the injuries sustained by Drews. On the other hand, the evidence is conclusive that the injuries sustained by Drews did not arise out of any violation of the contract or the contractual relationship of the parties, but were caused solely by the misconduct of the petitioner.

The contract, indemnity undertaken, and the facts considered by the court in the case of *Russell* v. *Shell Oil Co.*, 339 Ill. App. 168, 89 N. E. 2d 415, on which the petitioner relies, bear no similarity to those under consideration here. The contract in that case was to perform certain work. Russell agreed to paint certain electric light poles on the oil company's premises. The contract here is not that kind of a contract. As a part of the contract in that case, Russell agreed to hold the oil company harmless from all claims for injury to Russell's employees resulting from the performance of this work. The question of indemnification against claims for injury to employees is not involved in the agreement here. Furthermore, Drews was not an employee of the respondent, but of the Zipf Coal Company. In that case Campbell, an employee of Russell, while in the course of his employment and while attempting to paint one of these poles, fell and was injured. No such situation obtains in the case at bar. Campbell made

a claim for and was paid compensation. Russell, or his insurance company, brought an action against Shell to recover the compensation so paid. The facts in that case brought the claim of Campbell squarely, and without question, within the provisions of the indemnifying clause of that contract. His claim was precisely the kind of claim against which Russell had agreed to hold Shell harmless. The contract was capable of no other construction. Any other considerations were, therefore, immaterial. The *Russell* case is not helpful here.

In the recent case of *Southern Pacific Co.* v. *Layman*, 173 Oregon 275, 145 P. 2d 295, the Supreme Court of Oregon, in a rather extensive and well-considered opinion, reviewed many of the decided cases and stated the rule to be the same as that stated by the Supreme Court of Illinois. The facts in that case, as well as the terms and provisions of the agreement under consideration, are quite similar to the facts and the agreement under consideration here, but more favorable to the railway company in that the facility licensed by the railroad was on the railroad's right of way and not on the premises of the defendant as here. In that case, the railroad licensed the defendant to maintain a private way across its main line track to be used in connection with land belonging to the defendant across the tracks. A harvesting machine, owned by one Joseph Serres, while crossing the tracks at this private way, was struck by one of the plaintiff's trains. The plaintiff settled Serres' claim and brought suit against the defendant for the amount of the settlement. The licensing contract contained the following provision:

> "Licensee shall and hereby expressly agrees to indemnify and save harmless the licensor and its lessor from and against any and all losses, damage, injury, cost and expense of every kind and nature from any cause whatsoever, resulting directly or indirectly from the maintenance, presence or use of said crossing."

In holding that the defendant did not, by his agreement, undertake to indemnify the plaintiff against loss suffered as a result of its own negligence, the court said, beginning at page 279, as follows:

> "1. It is a firmly established rule that contracts of indemnity will not be construed to cover losses to the indemnitee caused by his own negligence unless such intention is expressed in clear and unequivocal terms. In *Perry* v. *Payne*, 217 Pa. 252, 262, 66 Atl. 553, 11 L. R. A. (N. S.) 1173, 10 Ann. Cas. 589, the court said:
>
> 'We think it clear, on reason and authority, that a contract of indemnity against personal injuries should not be construed to indemnify against the negligence of the indemnitee, unless it is so expressed in unequivocal terms. The liability on such indemnity is so hazardous, and the character of the indemnity so unusual and extraordinary, that there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation. No inference from words of general import can establish it.' "

Under the law and the facts applicable to the agreement under consideration, the respondent did not undertake to indemnify the petitioner for losses sustained as a result of its own misconduct. The Court of Appeals was correct in so holding and in reversing the judgment of the trial court. Its decision is in accord with the established law of Illinois, as well as of practically every other jurisdiction. The petitioner's purported reasons for granting the writ are wholly without foundation.

The petitioner's comments on the hazards of railroading are entirely beside the point. For ought that appears from the evidence the presence and use of the hopper more than likely reduced them in facilitating the unloading of coal cars on the respondent's premises.

Its comments on the inability of a railroad being able to afford to permit the construction of such a facility unless

secured by "full indemnification" is also without merit. What a railroad can afford or not afford to do, is not an issue here. If the petitioner, in drafting this contract, had contemplated requiring "full indemnification" for its own misconduct it would have been a simple matter to have specifically so stated in clear and unequivocal terms and submitted such a contract to the respondent for its consideration. Such a contract would, of course, have been refused. No industry, except a most favored one, could afford to pay such a price for such a simple facility as a coal hopper placed under a spur track on its premises. The absurdity of such a requirement is obvious.

As we have pointed out above, the decision of the Court of Appeals is not in conflict with the law of Illinois, but on the contrary, in accord with it. The Court of Appeals was not substituting its judgment for that of the trial court. It was correcting an erroneous judgment of that court.

The petitioner's comment with respect to the coal hopper requiring Drews to place himself and his truck in a hazardous position is also without merit. There was no hazard until it was created by the misconduct of the petitioner. The trial court was simply in error in holding that there was.

Nor was there any evidence of negligence on the part of the respondent as the petitioner purportedly attempts to indicate in its closing paragraph. The petitioner did not allege negligence, nor did it try its case on the theory that respondent was guilty of negligence. Drews did not inquire about "the engine" as the petitioner asserts (R. 54, 56) but merely with respect to the coal hopper. Nor did the engine approach on a "sharp curve" as the petitioner asserts. The plat of the respondent's premises (R. 11) shows that the curve was not sharp. Nor was there any duty on the part of the respondent to furnish protection for Drews. The bed of the truck, painted red, 10 feet long,

5 feet wide, and standing 12 feet high above the tracks, visible for more than 300 feet, was a sufficient warning to the switch engine crew of its presence and that of Drews, had they been looking. It is obvious that they were not. The injuries sustained by Drews were caused solely by the petitioner's misconduct.

The decision of the Court of Appeals is manifestly correct. The petition does not set up any grounds warranting a review by this Court on *certiorari*.

Conclusion.

For the foregoing reasons it is respectfully submitted that the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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